

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6

7 SUET F. WONG, an individual, ) 2:11-cv-001428-ECR-GWF  
8 Plaintiff, ) Order  
9 v. )  
10 CITI HOME LOANS SERVICING LP, a )  
11 Business Entity, form unknown; )  
12 MORTGAGE ELECTRONIC REGISTRATION )  
13 SYSTEMS, a Business Entity, form )  
14 unknown; and DOES 1-100 inclusive, )  
15 Defendants. )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

15  
16 I. Background

17 The Complaint (#1) alleges as follows: Plaintiff obtained a  
18 mortgage loan from Defendant Citi Home Loans Servicing LP ("Citi") on  
19 November 9, 1998 in the amount of \$145,500.00. (Compl. ¶ 2 (#1).)  
20 The loan was secured by a deed of trust on the property located at  
21 5402 Night Swim Lane, Las Vegas, Nevada 89113. (Id. ¶¶ 2-3.)

22 Plaintiff filed a Complaint (#1) on September 6, 2011, naming  
23 Citi Home Loans Servicing LP ("Citi") and Mortgage Electronic  
24 Registration Systems ("MERS") as Defendants and alleging the following  
25 twelve causes of action: (1) Declaratory Relief; (2) Injunctive  
26 Relief; (3) Contractual Breach of Good Faith and Fair Dealing; (4)  
27 Violations of TILA; (5) Violations of RESPA; (6) Rescission; (7)  
28 Unfair and Deceptive Acts and Practices (UDAP); (8) Breach of

1 Fiduciary Duty; (9) Unconscionability; (10) Predatory Lending; (11)  
2 Quiet Title; and (12) Lack of Standing; Improper Fictitious Entity.

3 Defendant Citi filed a Motion to Dismiss (#9) on October 25,  
4 2011. Plaintiff responded (#17) on November 2, 2011. Defendant MERS  
5 filed a Joinder (#19) to Citi's Motion to Dismiss (#9) on November 7,  
6 2011. Citi replied (#20) on November 9, 2011. MERS filed a second  
7 Joinder (#23) to Citi's Motion to Dismiss (#9) on December 15, 2011.

8 On November 3, 2011, we denied (#18) Plaintiff's motion for entry  
9 of clerk's default (#6).

10 Defendant MERS filed a Motion to Dismiss (#24) on February 23,  
11 2012. Plaintiff responded (#26) on February 27, 2012, and filed a  
12 second Response (#28) on February 29, 2012. MERS replied (#29) on  
13 March 9, 2012.

## 14 15 II. Legal Standard

16 A motion to dismiss under Federal Rule of Civil Procedure  
17 12(b)(6) will only be granted if the complaint fails to "state a claim  
18 to relief that is plausible on its face." Bell Atl. Corp. v. Twombly,  
19 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129 S. Ct. 1937,  
20 1953 (2009) (clarifying that Twombly applies to pleadings in "all  
21 civil actions"). On a motion to dismiss, except where a heightened  
22 pleading standard applies, "we presum[e] that general allegations  
23 embrace those specific facts that are necessary to support the claim."  
24 Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting  
25 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)) (alteration  
26 in original); see also Erickson v. Pardus, 551 U.S. 89, 93 (2007)

1 ("Specific facts are not necessary; the statement need only give the  
2 defendant fair notice of what the . . . claim is and the grounds upon  
3 which it rests.") (internal quotation marks omitted). Moreover,  
4 "[a]ll allegations of material fact in the complaint are taken as true  
5 and construed in the light most favorable to the non-moving party."  
6 In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)  
7 (citation omitted).

8 Although courts generally assume the facts alleged are true,  
9 courts do not "assume the truth of legal conclusions merely because  
10 they are cast in the form of factual allegations." W. Mining Council  
11 v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
12 "[c]onclusory allegations and unwarranted inferences are insufficient  
13 to defeat a motion to dismiss." In re Stac Elecs., 89 F.3d at 1403  
14 (citation omitted).

15

16

### III. Discussion

#### **A. Contractual Breach of Good Faith and Fair Dealing**

18 Under Nevada law, "[e]very contract imposes upon each party a  
19 duty of good faith and fair dealing in its performance and execution."  
20 A.C. Shaw. Constr. v. Washoe Cty., 784 P.2d 9, 9 (Nev. 1989) (quoting  
21 Restatement (Second) of Contracts § 205). To establish a claim for  
22 breach of the implied covenant of good faith and fair dealing, a  
23 plaintiff must show that: (1) the plaintiff and defendant were parties  
24 to a contract; (2) the defendant owed a duty of good faith and fair  
25 dealing to the plaintiff; (3) the defendant breached his duty by  
26 performing in a manner unfaithful to the purpose of the contract; and

27

28

1 (4) the plaintiff's justified expectations were denied. See Perry v.  
2 Jordan, 134 P.3d 698, 702 (Nev. 2006) (citing Hilton Hotels Corp. v.  
3 Butch Lewis Prod. Inc., 808 P.2d 919, 922-23 (Nev. 1991)).

4 Here, Plaintiff claims that Defendants breached the covenant by  
5 withholding information and placing Plaintiff in a loan for which she  
6 did not qualify. However, these alleged omissions and  
7 misrepresentations occurred *before* a contract was formed. A party  
8 cannot breach the covenant of good faith and fair dealing before a  
9 contract is formed. See Indep. Order of Foresters v. Donald, Lufkin  
10 & Jenrette, Inc., 157 F.3d 933, 941 (2d Cir. 1998) ("[A]n implied  
11 covenant relates only to the performance of obligations under an  
12 extant contract, and not to any pre-contract conduct."). Plaintiff  
13 fails to allege facts to establish that a breach occurred after the  
14 contract between the parties was formed. Because Plaintiff's claim  
15 revolves entirely around alleged misrepresentations made before the  
16 contract was entered into, it fails as a matter of law.

17 Moreover, Defendants were under no obligation to disclose the  
18 risks of the loan and whether Plaintiffs could afford it:

19 Although the Nevada Supreme Court has not ruled on the  
20 issue, this Court and the Ninth Circuit Court of Appeals  
21 have predicted that the Nevada Supreme Court would hold that  
22 a lender does not owe a fiduciary duty, as "an arms-length  
lender-borrower relationship is not fiduciary in nature,  
absent exceptional circumstances."

23 Megino v. Linear Fin., No. 2:09-CV-00370, 2011 WL 53086 at \*5 (D. Nev.  
24 Jan. 6, 2011) (quoting Yerington Ford, Inc. v. Gen. Motors Acceptance  
25 Corp., 359 F.Supp.2d 1075, 1090 (D.Nev. 2004), overruled on other  
26 grounds by Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865 (9th  
27 Cir. 2007)). Where there is no duty to determine a borrower's ability

1 to repay the loan, there can be no breach of that obligation. For  
2 this additional reason, Plaintiff's claim must fail.

3 **B. Violations of TILA**

4 The Truth in Lending Act ("TILA") imposes a one-year statute of  
5 limitations within which a claim for damages "may be brought." 15  
6 U.S.C. § 1640(e). "[A]s a general rule the limitations period starts  
7 at the consummation of the transaction." King v. California, 784 F.2d  
8 910, 915 (9th Cir. 1986). Equitable tolling may nonetheless apply in  
9 certain circumstances and can operate to suspend the limitations  
10 period until the borrower discovers or has reasonable opportunity to  
11 discover the fraud or non-disclosure that form the basis of the TILA  
12 action. See id. at 914-15. However, such equitable tolling is only  
13 appropriate when "despite all due diligence, a plaintiff is unable to  
14 obtain vital information bearing on the existence of his claim."  
15 Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000); see  
16 also Bailey v. Aurora Loan Servs., LLC, No. 2:10-cv-02119-GMN-PAL,  
17 2011 WL 3300234, at \*2 (D. Nev. Aug. 1, 2011) (citing Copeland v.  
18 Lehman Bros. Bank, No. 09cv1774-WQH-RBB, 2011 WL 9503, at \*6 (S.D.  
19 Cal. Jan. 3, 2011)). Additionally, where the basis of equitable  
20 tolling is fraudulent concealment, it must be pled with particularity  
21 under Federal Rule of Civil Procedure 9(b). 389 Orange St. Partners  
22 v. Arnold, 179 F.3d 656, 662 (9th Cir. 1999).

23 Here, Plaintiff filed this lawsuit almost thirteen years after  
24 the consummation of the underlying transaction and has pleaded no  
25 facts indicating that any Defendant prevented Plaintiff from  
26 discovering the alleged TILA violations or otherwise caused Plaintiff

27

28

1 to miss the filing deadline. Although Plaintiff claims that the  
2 statute of limitations was "tolled due to Defendants' failure to  
3 effectively provide the required disclosures and notices (Compl. ¶ 60  
4 (#1)), Plaintiff does not explain why these alleged TILA violations  
5 could not have been discovered by exercising reasonable diligence.  
6 Accordingly, Plaintiff's TILA damages claim is time-barred and will be  
7 dismissed.

8 **C. Violations of RESPA**

9 The Real Estate Settlement Procedures Act ("RESPA") imposes  
10 either a one- or a three-year statute of limitations depending on the  
11 violation alleged. 12 U.S.C. § 2614. Violations of sections 2607 and  
12 2608 have a one-year statute of limitations, whereas violations of  
13 section 2605 have a three-year statute of limitations. Id.

14 Plaintiff fails to state which of these three provisions  
15 Defendants allegedly violated. Such a failure may itself be  
16 sufficient grounds for the dismissal of a RESPA claim. See Bailey,  
17 2011 WL 3300234, at \*3 (citing Gorospe v. Sec. Nat'l Mortg., CV No.  
18 10-00506 DAE-BMK, 2011 WL 57884, at \*7 (D. Haw. Feb. 8, 2011)). The  
19 Court and Defendants should not have to speculate as to under which  
20 provisions Plaintiff is suing. Regardless, the claims are time-barred  
21 as they arise out of the origination of the loan transaction  
22 consummated in 1998, well over three years ago. Plaintiff has failed  
23 to argue that equitable tolling applies to this claim, nor has  
24 Plaintiff pleaded any facts that would support a finding of equitable  
25 tolling. Accordingly, Plaintiff's RESPA cause of action will be  
26 dismissed.

1 **D. Unfair and Deceptive Acts and Practices**

2 Plaintiff's seventh claim for violation of Nevada's Unfair and  
3 Deceptive Trade Practice Act, Nev. Rev. Stat. § 598.0923, also fails  
4 as a matter of law. According to the statute, a person engages in  
5 deceptive trade practices when he or she knowingly conducts his or her  
6 business or occupation without all required state, county, or city  
7 licenses. NEV. REV. STAT. § 598.0923(1). However, the statutes make  
8 explicit that the following activities do not constitute "doing  
9 business" in the State of Nevada: (1) maintaining, defending or  
10 settling any proceeding; (2) creating or acquiring indebtedness,  
11 mortgages, and security interests in real or personal property; and  
12 (3) securing or collecting debts or enforcing mortgages and security  
13 interests in property securing the debts. NEV. REV. STAT. §  
14 80.015(1)(a), (g)-(h). Because Defendants are explicitly exempted  
15 from acquiring licenses in this mortgage foreclosure case, Plaintiff's  
16 claim is without merit.

17 Moreover, Plaintiff's seventh cause of action for violation of  
18 Nevada's Unfair and Deceptive Trade Practices Act, Nev. Rev. Stat. §  
19 598.0923, is also time-barred. "The unfair lending practices claim is  
20 barred by the statute of limitations because the lawsuit was filed  
21 over three years after the loans were made." Smith, 773 F.Supp.2d at  
22 944 (citing NEV. REV. STAT. § 11.190(3)(a)). Accordingly, Plaintiff's  
23 unfair practices claim must be dismissed.

24 **E. Breach of Fiduciary Duty**

25 It is well-settled that lenders and servicers owe no fiduciary  
26 duties to mortgage borrowers. Megino v. Linear Fin., No. 2:09-CV-

1 00370, 2011 WL 53086 at \*5 (D. Nev. Jan. 6, 2011) (quoting Yerington  
2 Ford, Inc. v. Gen. Motors Acceptance Corp., 359 F.Supp.2d 1075, 1090  
3 (D.Nev. 2004), overruled on other grounds by Giles v. Gen. Motors  
4 Acceptance Corp., 494 F.3d 865 (9th Cir. 2007)); see also Kwok v.  
5 Recontrust Co., No. 2:09-cv-02298, 2010 WL 255615, at \*5 (D. Nev. June  
6 23, 2010); Saniel v. Recontrust Co., No. 2:09-cv-2290, 2010 WL  
7 2555625, at \*5 (D. Nev. June 23, 2010); Renteria v. United States, 452  
8 F.Supp.2d 910, 922-23 (D. Ariz. 2006) (holding that borrowers cannot  
9 establish the reliance element of their claim because lenders have no  
10 duty to determine the borrower's ability to repay the loan); Oaks  
11 Mgmt. Corp. v. Superior Court of San Diego Cty., 51 Cal. Rptr. 3d 561,  
12 570 (Cal. Ct. App. 2006). Plaintiff has failed to allege sufficient  
13 facts to establish that Defendants acted as anything other than arms-  
14 length lenders which does not, in itself, create a fiduciary  
15 relationship. Absent a duty, there can be no breach. See A.C. Shaw,  
16 784 P.2d at 10. Furthermore, Plaintiff's claim is time-barred by a  
17 three-year statute of limitations governing breach of fiduciary duty  
18 claims. NEV. REV. STAT. § 11.190(3)(d). Accordingly, Plaintiff's claim  
19 for breach of a fiduciary duty fails to state a claim upon which  
20 relief can be granted.

#### 21 **F. Unconscionability**

22 Unconscionability is not a claim for relief, but rather a defense  
23 to a breach of contract claim. The Court will therefore treat  
24 Plaintiff's claim as a request for a declaratory judgment that the  
25 mortgage is unconscionable and unenforceable. See Ahmed v. Deutsche  
26 Bank, N.A., No. 2:09-cv-02234-GMN-LRL, 2011 WL 3425460, at \*7 (D. Nev.



1 Aug. 4, 2011); Villa v. First Guar. Fin. Corp., No. 2:09-cv-02161-GMN-  
2 RJJ, 2010 WL 2953954, at \*5 (D. Nev. July 23, 2010). Under Nevada  
3 law, both procedural and substantive unconscionability must be present  
4 in order for a court to exercise its discretion to refuse to enforce  
5 a contract on this ground. Burch v. Cty. of Washoe, 49 P.3d 647, 650  
6 (Nev. 2002). Procedural unconscionability exists when a party lacks  
7 a meaningful opportunity to agree to a contract's terms and often  
8 involves the use of fine print or complicated, misleading language.  
9 D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004). A  
10 contract is substantively unconscionable when the contract's terms and  
11 the circumstances at the time of the execution are so one-sided as to  
12 oppress or unfairly surprise an innocent party. Guerra v. Hertz  
13 Corp., 504 F.Supp.2d 1014, 1021 (D. Nev. 2007) (citation omitted).

14 Here, Plaintiff's claim for unconscionability fails. Plaintiff  
15 does not claim that there was no meaningful opportunity to agree to  
16 contract terms, nor does Plaintiff claim that the terms of the loan  
17 agreement are substantively unconscionable. Plaintiff provides no  
18 more than bald legal conclusions insufficient to survive a motion to  
19 dismiss pursuant to Rule 12(b)(6). Furthermore, the procedures and  
20 processes concerning home loan and mortgages are strictly regulated by  
21 numerous federal act including TILA and RESPA. Hall v. MortgageIt,  
22 Inc., No. 2:09-CV-2233 JCM (GWF), 2011 WL 2651870 (D. Nev. July 6,  
23 2011). As noted above, Plaintiff's TILA and RESPA claims are time-  
24 barred. Plaintiff's claim of unconscionability will therefore be  
25 dismissed.

1 **G. "Predatory Lending"**

2 Plaintiff's tenth cause of action is entitled "Predatory  
3 Lending." There is currently no common law cause of action for  
4 "predatory lending." Moreover, the claims are duplicative of  
5 allegations made with regard to Plaintiff's other causes of action for  
6 violations of TILA, violation of Nevada's Unfair and Deceptive Trade  
7 Practices Act, and breach of fiduciary duty. To the extent that  
8 Plaintiff claims that Defendants engaged in fraud, the allegations are  
9 far from sufficient in light of Federal Rule of Civil Procedure 9(b),  
10 which requires that circumstances constituting fraud must be stated  
11 with particularity. For these reasons, Plaintiff's claim for  
12 "predatory lending" must be dismissed.

13 **H. Quiet Title**

14 In Nevada, a quiet title action may be brought "by any person  
15 against another who claims an estate or interest in real property,  
16 adverse to the person bringing the action, for the purpose of  
17 determining such adverse claim." NEV. REV. STAT. § 40.010. "In a quiet  
18 title action, the burden of proof rests with the plaintiff to prove  
19 good title in himself." Breliant v. Preferred Equities Corp., 918  
20 P.2d 314, 318 (Nev. 1996). "Additionally, an action to quiet title  
21 requires a plaintiff to allege that she has paid any debt owed on the  
22 property." Lalwani v. Wells Fargo Bank, N.A., No. 2-11-cv-00084, 2011  
23 WL 4574338, at \*3 (D. Nev. Sep. 30, 2011) (citing Ferguson v. Avelo  
24 Mortg., LLC, No. B223447, 2011 WL 2139143, at \*2 (Cal.App.2d June 1,  
25 2011)). Plaintiff has failed to allege that Plaintiff is not in  
26  
27  
28

1 breach of the loan agreement. Accordingly, Plaintiff's eleventh cause  
2 of action is dismissed.

3 **I. "Lack of Standing; Improper Fictitious Entity"**

4 As part of the eleventh cause of action, Plaintiff alleges that  
5 MERS is an artificial entity that has no beneficial interest in the  
6 underlying note, rendering any assignments executed by MERS a nullity.  
7 Plaintiff further alleges that MERS has no legal standing to foreclose  
8 on the property. The Court will address Plaintiff's allegations in  
9 spite of the fact there is no common law cause of action for "lack of  
10 standing," as Plaintiff's claims are similar to many of those asserted  
11 in this District as part of a cause of action for wrongful  
12 foreclosure.

13 The Ninth Circuit has rejected Plaintiff's argument that the  
14 involvement of MERS somehow invalidates a later foreclosure:

15 Even if we were to accept the plaintiffs' premises that MERS  
16 is a sham beneficiary and the note is split from the deed,  
17 we would reject the plaintiffs' conclusion that, as a  
18 necessary consequence, no party has the power to foreclose  
19 . . . MERS did not initiate foreclosure: the trustees  
20 initiated foreclosure in the name of the lenders. Even if  
21 MERS were a sham beneficiary, the lenders would still be  
22 entitled to repayment of the loans and would be proper  
23 parties to initiate foreclosure after the plaintiffs  
24 defaulted on their loans.

25 Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1044 (9th  
26 Cir. 2011). Furthermore, as was the case in Cervantes, Plaintiff's  
27 allegations do not call into question whether the trustees were agents  
28 of the lenders, nor do they raise any inference that the foreclosure  
was otherwise improper. See id. Furthermore, this District has held  
that even though MERS does not have a beneficial interest in the  
underlying note, MERS as a nominee for the lender on a deed of trust

1 has the power to assign the lender's beneficial interest and to  
2 foreclose on the property. See, e.g., Smith v. Cmty. Lending, Inc.,  
3 773 F.Supp.2d 941, 944 (D.Nev. 2011). Plaintiff's twelfth cause of  
4 action is therefore completely without merit and must be dismissed.

5 **J. Declaratory and Injunctive Relief**

6 Injunctive and declaratory relief are remedies, not independent  
7 causes of action. Parker v. Greenpoint Mortg. Funding Inc., No. 3:11-  
8 cv-00039-ECR-RAM, 2011 WL 2923949, at \*5 (D. Nev. Jul. 15, 2011); In  
9 re Wal-Mart Wage & Hour Emp't Practices Litig., 490 F.Supp.2d 1091,  
10 1130 (D. Nev. 2007). Because we have dismissed all of Plaintiff's  
11 substantive causes of action, Plaintiff's first and second causes of  
12 action for declaratory and injunctive relief must also be dismissed.

13 **K. Rescission**

14 To the extent that Plaintiff's sixth cause of action for  
15 rescission is premised on TILA violation, it must be dismissed. A  
16 TILA rescission claim has a three-year statute of limitations that is  
17 not subject to equitable tolling. Bailey v. Aurora Loan Servs., LLC,  
18 2011 WL 3300234, at \*3 (citing Birk v. Gateway Funding Corp., No. CIV  
19 S-10-1039-MCE-CMK, 2011 WL 590865, at \*5 (E.D.Cal. Feb. 10, 2011)).  
20 Furthermore, like Plaintiff's "claims" for declaratory and injunctive  
21 relief, rescission is a remedy and not an independent cause of action  
22 under Nevada law. Frederick v. Fed. Nat'l Mortg. Ass'n, No. 2:11-cv-  
23 00522-GMN-CWH, 2012 WL 1340801, at \*6 (D. Nev. Apr. 18, 2012); see  
24 also Great Am. Ins. Co. v. Gen. Builders, Inc., 934 P.2d 256 (Nev.  
25 1997) ("[R]escission is not a claim, but rather a remedy."). Because  
26  
27  
28

1 we dismiss all of Plaintiff's substantive claims, we will also dismiss  
2 Plaintiff's "claim" for the remedy of rescission.

3  
4 **IV. Conclusion**

5 Plaintiff has asserted twelve causes of action relating to a loan  
6 transaction consummated in 1998. As such, the vast majority of  
7 Plaintiff's claims are time-barred, and all of them are without merit.  
8 The Complaint (#1) must therefore be dismissed in its entirety.

9  
10 **IT IS, THEREFORE, HEREBY ORDERED** that Defendants Citi's Motion to  
11 Dismiss (#9) and Defendant MERS's Motion to Dismiss (#24) are **GRANTED**.

12  
13 The Clerk shall enter judgment accordingly.

14  
15  
16 DATED: May 23, 2012.

17   
18 UNITED STATES DISTRICT JUDGE